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No. 19, Original

In the Supreme Court of the United States

OCTOBER TERM, 1931

EX PARTE: THE STATE OF COLORADO, PETITIONER

ON MOTION FOR LEAVE TO FILE PETITION FOR A WRIT OF MANDAMUS TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

RESPONSE TO RULE TO SHOW CAUSE WHY LEAVE TO FILE PETITION FOR A WRIT OF MANDAMUS SHOULD NOT BE GRANTED

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To the Honorable the CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

J. Foster Symes, Judge of the United States District Court for the District of Colorado, does hereby make return to the rule to show cause issued herein on the twenty-third day of February, 1932, why leave to file a petition for a writ of mandamus should not be granted, and he respectfully answers and certifies as follows:

1. All the acts of which the petitioner complains were the acts of respondent, J. Foster Symes, as District Judge of the United States for the District of Colorado.

2. On November 13, 1931, there was presented to the said District Court the duly verified petition of Henry Dierks wherein it was set forth that on November 9, 1931, an information was filed in the District Court for the First Judicial District of the State of Colorado, sitting in and for the County of Arapahoe, charging the petitioner with having on November 7, 1931, within the said County of Arapahoe, feloniously, unlawfully, deliberately, premeditatedly, and of malice aforethought, killed and murdered one Melford Smith, and that the petitioner was arrested on said charge and was admitted to bail in the sum of $5,000.

The petition further alleged that for a long time prior to November 7, 1931, and at all times mentioned in the petition, the petitioner was a United States Prohibition Agent, regularly appointed and commissioned by the Bureau of Prohibition of the United States Department of Justice to enforce the laws and regulations relating to the manufacture, sale, transportation, control, and taxation of intoxicating liquors; that the act for which the petitioner was informed against "was performed while he was engaged in the discharge of the duties of his office as United States Prohibition Agent, and while he was acting by and under authority of the Internal Revenue laws of the United States, and was done under and by right of his office, to-wit, as United States Prohibition Agent, and while he was engaged in the discharge of his official duties in making and attempting to make an investigation

concerning a violation of the National Prohibition Act, and other Internal Revenue laws, and reporting the results of said investigation, and in protecting himself in the discharge of his duty"; that on November 7, 1931, the petitioner, by direction of John C. Richardson, United States Deputy Prohibition Administrator in Charge of Enforcement for the State of Colorado, that he investigate a complaint of violations of the National Prohibition Act and internal revenue laws at Number 3005 South Broadway, in the City of Englewood, County of Arapahoe, Colorado, proceeded, together with Federal Prohibition Agent E. E. Ellsworth, at about 9.30 o'clock p. m. of that day, to the said address; that upon arriving at the said premises the petitioner observed that they were occupied and used as a hamburger stand or restaurant open to and catering to the public; that the petitioner thereupon entered the place and, after informing the proprietor, or man in charge, that he, the petitioner, was a Federal prohibition agent, exhibited to him his badge as such agent, and stated that he had come to investigate reported violations of the National Prohibition Act and desired to look around the premises, and that the proprietor, or man in charge, gave the petitioner permission to search the premises. The petition contained the further allegations:

> That while your petitioner, as such Federal Prohibition Agent, was in the act of observing and searching said premises, one

Melford Smith entered said hamburger stand or restaurant, walked to the rear of said hamburger stand or restaurant, seated himself on an unoccupied stool at the counter of said hamburger stand or restaurant, took out a pint bottle of wine from his inside coat pocket, and set the said bottle of wine on the counter in said premises, in full and open view of your petitioner, and the said Melford Smith then proceeded to look for a drinking glass.

That your petitioner thereupon, upon seeing said bottle of wine in the possession of the said Melford Smith in full and open view in said hamburger stand or restaurant, believing that the said Melford Smith was engaged in the violation of the National Prohibition Act and the Internal Revenue laws of the United States, proceeded to take possession of said bottle of wine, and to arrest the said Melford Smith; that thereupon the said Melford Smith did resist arrest, did attempt to destroy said bottle of wine, and did proceed to assault your petitioner and did attempt to escape; and that thereupon one Al Green did attempt to assist the said Melford Smith to assault your petitioner, and to help the said Melford Smith to escape, and that in the scuffle that ensued, and while your petitioner was engaged in the discharge of his official duties as such Federal Prohibition Officer in making, and attempting to make, said arrest of said Melford Smith, and in protecting himself in the discharge of his duties, and in attempting to seize said bottle

of wine, it became necessary in order to subdue the said Melford Smith for your petitioner to strike, and he did strike, the said Melford Smith on the head with your petitioner's gun; that thereupon Federal Prohibition Agent, E. E. Ellsworth, came to the assistance of your petitioner; and that your petitioner and Federal Prohibition Agent, E. E. Ellsworth, did arrest the said Melford Smith, the said Al Green, and one Leonard Carpenter, and did convey them to the City Jail of the City and County of Denver, and State of Colorado, where they were incarcerated pending the filing of charges against said named Melford Smith, Al Green and Leonard Carpenter, for a violation of the National Prohibition Act and for assaulting an officer of the United States.

That at the time said Melford Smith was placed in the City Jail of the City and County of Denver, he did not appear to have received any serious or other injury, but that on the following day the said Melford Smith became sick and died, and your petitioner is informed and upon information and belief alleges that the said Melford Smith did die from an injury to his head caused by a blow given to the said Melford Smith by your petitioner during the scuffle with your petitioner while the said Melford Smith was resisting arrest and attempting to destroy said bottle of wine and attempting to escape, as hereinbefore set forth.

That the said charge of murder, so filed, as hereinabove related, against your petitioner,

> is based entirely upon the circumstances surrounding the said injury and subsequent death of the said Melford Smith as hereinabove related; and that your petitioner does hereby state and allege that he is not guilty of the crime of murder, or any other offense, under the laws of the State of Colorado, or the United States of America; and that the said criminal proceeding so begun against your petitioner in said District Court of Arapahoe County and pending therein arises out of and solely by reason of the acts performed by your petitioner as an officer acting by and under the authority of the Revenue Laws of the United States and the National Prohibition Act, while acting as a United States Prohibition Agent.

The petition prayed that a writ of habeas corpus cum causa issue directing that the record and proceedings be transferred to the District Court of the United States for the District of Colorado. Accompanying the petition was a certificate by Ralph L. Carr, United States Attorney for the District of Colorado, that as counsel for the petitioner he had examined the proceedings against the petitioner and had carefully inquired into all the matters set forth in the petition and that he believed the same to be true. The contents of the petition are set forth as an exhibit to the motion for the State of Colorado for leave to file a petition for a writ of mandamus, at pages 18–22.

3. Upon consideration of this petition, it was ordered by the District Court that the writ of ha-

beas corpus cum causa issue to remove the prosecution to that court. (*Id.* 22, 24–25.) In obedience to the writ, the record and proceedings in the State Court were transmitted to the District Court.

On November 19, 1931, the State of Colorado filed in the District Court a motion to quash the writ and to remand the case to the State Court. The grounds upon which this motion was based were set forth in thirty numbered paragraphs. (*Id.* 27–32.) In so far as the grounds stated were relevant to the issue to be determined, viz, whether the allegations of the petition were sufficient to justify the removal of the prosecution to the District Court, they were in substance as follows:

(1) The petition affirmatively shows that the petitioner did not fully, fairly, and completely disclose facts entitling him to immunity from punishment by the State of Colorado by reason of the fact that the act charged against him as a crime was justified by his duty under the Federal law. (Par. 10.)

(2) It does not affirmatively appear from the petition that at the time the alleged offense was committed the petitioner was doing nothing other than what was justified by his Federal duty upon which the prosecution against him could be based. (Par. 11.)

(3) It affirmatively appears from the petition that at the time the alleged offense was committed by the petitioner he was acting beyond the scope of the rights, powers, and duties devolving upon

him as a Federal prohibition officer. (Pars. 12, 13.)

(4) It affirmatively appears that the allegations of the petition are vague, indefinite, uncertain, and evasive and are not intended to and do not apprise the court fairly, fully, and completely of the petitioner's defense whereby he would be entitled, by reason of his conduct as a prohibition officer, to immunity from punishment under the laws of the State of Colorado for the crime charged in the information. (Par. 18.)

(5) It affirmatively appears from the petition that it contains no allegations of fact, but alleges only conclusions of law or of fact. (Par. 23.)

(6) It affirmatively appears from the petition that no fact is therein alleged from which the court could find that the deceased was resisting arrest or attempting to escape from a lawful arrest made by a properly constituted officer of the United States. (Par. 24.)

(7) It does not affirmatively appear from the petition that the petitioner was assaulted in any manner. (Par. 30.)

4. On January 2, 1932, after hearing and argument, the District Court overruled the motion of the State of Colorado to quash the writ of habeas corpus cum causa and to remand the case to the State Court. (Id. 33.)

5. In denying the motion to remand the District Court in an opinion expressed the view that the petitioner was entitled to have the case removed

under that portion of Section 33 of the Judicial Code which provides that—

> When any civil suit or criminal prosecution is commenced in any court of a State against any officer appointed under or acting by authority of any revenue law of the United States now or hereafter enacted, or against any person acting under or by authority of any such officer, on account of any act done under color of his office or of any such law * * *, the said suit or prosecution may, at any time before the trial or final hearing thereof, be removed for trial into the district court next to be holden in the district where the same is pending, upon the petition of such defendant to said district court, and in the following manner * * *.

The District Court referred to the allegations of the petition as showing that, acting under authority of a Federal revenue law, the petitioner was on the premises in question under orders of his superior officers and saw the Federal law being violated; that he admitted that the death of the deceased resulted from a blow received while resisting arrest and assaulting the petitioner; that the petition negatived the possibility that the petitioner was acting otherwise than officially at the time, and showed that whatever the petitioner did leading to the prosecution was done under color of his official Federal duty.

The court was further of the opinion that under Section 33 it is only necessary to show that the act

upon which the prosecution was based was done in the probable pursuance of the officer's duties and was within the apparent scope of his authority; that all that is necessary is a prima facie showing that the act charged as an offense was done under the color of office; that the phrase "color of office" may cover a claim that later turns out to be groundless, as well as a claim, which upon further investigation, is shown to be well founded, and that the statute requires only a fair showing that the officer was acting at the time in the probable course of his duty.

6. The District Court therefore adjudged that, under the facts of the case, it possessed jurisdiction to order the removal of the prosecution from the State Court and jurisdiction to proceed with the trial of the cause, which it intends to do, unless otherwise directed by this Honorable Court.

7. The respondent asserts that upon the record established by the petition for removal and by the motion of the State of Colorado to remand, the District Court had lawful jurisdiction to order the removal of the prosecution. In deciding the questions of law and fact raised by the petition for removal the District Court acted in the exercise of its judicial discretion and within the bounds of its lawful jurisdiction. And the respondent denies that the action of the District Court was in violation of the Constitution or laws of the United States, or of the Constitution or laws of the State

of Colorado. And the respondent denies that the District Court either transcended its jurisdiction or usurped the jurisdiction of the State of Colorado.

And these are the reasons which the respondent offers why leave to file the petition for mandamus should not be granted.

Your respondent respectfully submits to the judgment of this Honorable Court.

J. FOSTER SYMES,
Judge of the District Court
of the United States
for the District of Colorado.

DENVER, COLORADO, *March, 1932.*

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